

CHIEF JUDGE BRYAN D. LYNCH  
Chapter 11  
Hearing Date: January 24, 2018  
Hearing Time: 9:00 a.m.  
Courtroom: Tacoma, Room 1  
Response Deadline: January 17, 2018

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF WASHINGTON

In re:

OLYMPIA OFFICE LLC;  
WA PORTFOLIO LLC;  
MARINERS PORTFOLIO LLC; and  
SEAHAWK PORTFOLIO LLC

Debtors.

Case No. 17-44721-BDL-Lead Case

**MLMT 2005-MCP1 WASHINGTON OFFICE PROPERTIES, LLC'S RESPONSE TO  
THE DEBTORS' MOTION TO TERMINATE THE PRE-PETITION  
COURT APPOINTED RECEIVER AND TO ALLOW THE PRE-PETITION  
COURT APPOINTED RECEIVER TO REMAIN IN PLACE**

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1 Secured Creditor MLMT 2005-MCP1 Washington Office Properties, LLC (“Noteholder”),  
2 through its undersigned counsel, objects to the Debtors’ motion (the “Motion”) to: (a) terminate JSH  
3 Properties, Inc. (the “Receiver”) as the pre-petition court appointed receiver, and directing the Receiver  
4 to turnover to the Debtors (i) possession and control of the Properties,<sup>1</sup> (ii) cash in the Receiver’s  
5 accounts related to the Properties, and (iii) books and records related to the Properties; and (b) authorize  
6 the Debtors to remit payments to be applied to debtor-in-possession financing or principal amounts owed  
7 to Noteholder. Noteholder further requests that the Court, pursuant to Section 543(d), excuse  
8 compliance with Bankruptcy Code Section 543(a), (b), and (c), and to allow the Receiver to remain in  
9 place in these cases.

## 10 **I. INTRODUCTION**

11 Like these cases and Debtors’ recently dismissed New York bankruptcy cases, Debtors’ motion  
12 to terminate the Receiver is a desperate cash grab. Debtors purportedly acquired the Properties for a  
13 mere \$100,000 in September 2016 through a transfer that was made in fractional interests on the eve of  
14 a long scheduled foreclosure sale. Since the purported transfer, Debtors have filed multiple bankruptcies  
15 to avoid the foreclosure sale of the Properties, and have refused to invest any money in the Properties  
16 beyond the \$100,000 acquisition price. Debtors have repeatedly sought to loot any value from the  
17 Properties, by filing motions in their dismissed New York bankruptcy, Washington State court, and this  
18 Court, in which they have sought to, among other things, avoid the foreclosure sale of the Properties,  
19 reduce Noteholder’s secured and matured debt, remove the Receiver that was put in place to remedy  
20 gross mismanagement by CDC, grab the cash being held by the Receiver, and replace the Receiver with  
21 their own property manager that would not have the fiduciary and other obligations imposed upon the  
22 Receiver by the Court that appointed the Receiver. Debtors also refused to fund or guarantee debtor in  
23 possession financing for necessary life safety repairs that Noteholder ultimately funded at the outset of  
24 the New York bankruptcy. Under these circumstances, the turnover of the Properties to the Debtors is  
25 inappropriate.

26 Debtors also do not provide definite terms for their proposed retention of Kidder Mathews.  
27 Debtors’ proposal to employ Kidder Mathews as property manager should be rejected as it is beholden

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28 <sup>1</sup> The Properties consist of eight office properties in Washington State that the Debtors purportedly acquired for a  
29 mere \$100,000 from the Management Representative of CDC Properties I, LLC (“CDC”), another Debtor whose  
bankruptcy proceedings are pending before this Court.

1 to Debtors, having acted as Debtors' appraiser in the New York bankruptcy cases and these cases, and  
2 having been proposed by the Debtors as the real estate broker for the liquidation of the Properties.

3 Debtors also should not be permitted to take possession of the Properties from the Receiver for  
4 the reasons set forth in Noteholder's January 3, 2018 Motion for Relief From the Automatic Stay or in  
5 the Alternative for Dismissal (the "Motion for RFS/to Dismiss") [Dkt. No. 30]. As set forth in that  
6 motion, Debtors are prosecuting these cases in bad faith, Debtors maintain no equity in the Properties,  
7 and the Properties are not necessary to an effective reorganization that is in prospect. These facts entitle  
8 Noteholder to relief from the automatic stay or dismissal to enable Noteholder to foreclose on the  
9 Properties and finally extricate Debtors from the Properties in the wake of their improper purported  
10 transfer. Under these circumstances, the Receiver, who has been in place for nearly two years and has  
11 a substantial working knowledge with respect to the Properties and an extremely positive relationship  
12 with the tenants, should remain in place as the Receiver is in the best position to maintain the value of  
13 the Properties for the benefit of Noteholder and all other creditors of the Debtors' estates.

## 14 **II. FACTS**

### 15 **A. Noteholder Commences Foreclosure Sales and Obtains an Order Appointing the Receiver**

16 These bankruptcy filings are the third last-minute attempt by Debtors to avoid foreclosure sales  
17 of the Properties. On March 11, 2016, Noteholder commenced non-judicial foreclosure proceedings of  
18 the Properties by issuing Notices of Default with respect to each of the Properties. The Properties were  
19 scheduled to be sold at foreclosure sales on October 21, 2016. (Exs. A-H.)<sup>2</sup> At the time those sales  
20 were noticed, the Properties were held by CDC, the reorganized debtor in Case No. 11-41010 pending  
21 before this Court (the "CDC Bankruptcy"). Noteholder is the senior secured creditor of CDC pursuant  
22 to two loans (the "Loans") whose balance as of their October 17, 2017 maturity date was at least  
23 \$46,613,166.93. (Exs. I and J.) As discussed in the Bornheimer Declaration, the Loans have been in  
24 default since July 2013. The Loans are secured by Deeds of Trust on the Properties (collectively, the  
25 "Deeds of Trust"), which prohibit CDC from conveying the Properties without Noteholders' consent.  
26 (Ex. K, p. 72, § 9.02.)  
27  
28

29 <sup>2</sup> References to "Ex. \_\_" and "¶ \_\_" refer to the exhibits to the January 2, 2018 Declaration of David Bornheimer (the "Bornheimer Declaration") [Dkt. No. 31] filed in support of the Motion for RFS/to Dismiss.

1 In May, 2016, Noteholder filed a Petition to Appoint Custodial Receiver in King County,  
2 Washington Superior Court (the “State Court”) to, obtain the appointment of a receiver over the  
3 Properties. On May 19, 2016, the State Court entered an Order Appointing Custodial Receiver (the  
4 “Receiver Order”), pursuant to which the Receiver was appointed. (Appendix 38-56.) When the  
5 Receiver was appointed, the Properties were in severe disarray and disrepair due to the delinquent  
6 management of the principals of CDC. As set forth in the Receiver Order, at the time the Receiver was  
7 appointed the revenue-producing potential of the Properties had been impaired and Noteholder’s interest  
8 in the Properties was in danger of being lost or materially impaired. (*Id.* at §§ 1.9, 1.10.) Pursuant to  
9 the Receiver Order, the Receiver is authorized to, among other things, maintain possession of the  
10 Properties, manage the Properties, collect rents from the Properties, and negotiate leases for the  
11 Properties. (*Id.* at §§ 3.3.1, 3.3.2, 3.3.3, 3.4.4.) The Receiver Order also set forth the compensation that  
12 the Receiver is entitled to for its services. (*Id.*)

13 **B. Debtors Pay \$100,000 for the Unlawful Purported Transfer of the Properties**

14 After the Receiver was appointed, in or around July 2016, counsel for Eric D. Orse (“Orse”),  
15 the management representative of CDC, was approached by a representative of certain individuals and  
16 entities interested in acquiring the Properties. (Ex. L at 17:19-18:8, 20:5-24.) Those individuals and  
17 entities included, among others, Scott G. Switzer, the declarant that Debtors rely upon in support of their  
18 Motion who had previously done business with CDC and is a known quantity to the bankruptcy courts.<sup>3</sup>  
19 (Ex. M at 67:2-68:10, 73:6-74:8, 348:22-349:21, 351:20-352:9.) By a September 9, 2016 Purchase  
20 Agreement, Orse ultimately agreed with an affiliate of Debtors to transfer the Properties for \$100,000.  
21 (Ex. N.) In connection with negotiating that agreement, Orse’s counsel provided the Deeds of Trust and  
22 CDC’s November 22, 2011 Plan of Reorganization (the “CDC Plan”) to Debtors’ counsel. (Ex. O.) The  
23 CDC Plan prohibited CDC from transferring the Properties without repaying the Loans and also required  
24 any transfer to be free and clear of liens and encumbrances (Ex. P, p. 20, ¶ 6.), and Orse’s counsel  
25 specifically identified those prohibitions to Debtors in writing. (Ex. O.)

26  
27  
28 <sup>3</sup> A search of the Western District of Washington Bankruptcy Court PACER system identifies Switzer’s own  
29 Chapter 7 bankruptcy (Case No. 11-22708-TWD), as well as four other cases in which Switzer was named as a  
defendant: *United States Trustee, et al. v. Switzer* (Case No. 12-01427-TWD); *Rigby, et al. v. Hazelrigg, III, et al.*  
(Case No. 10-01134-MLB); *Banner Bank v. Funsters Grand Casino Inc., et al.* (Case No. 02-01600-PHB);  
and *Definitive Audio Inc. v. Funsters Grand Casino Inc., et al.* (Case No. 02-01568-PHB).

1 Notwithstanding the clear prohibitions on transfer in the Deeds of Trust and the CDC Plan, on  
2 or around September 23, 2016 Orse provided Debtors with Quit Claim Deeds to the Properties for  
3 \$100,000 (the “Transfer”), which Quit Claim Deeds conveyed fractional interests in the Properties to  
4 Debtors as tenants in common organized in four separate states. (Ex. Q.) Debtors did not exist until the  
5 time of the Transfer. (Exs. OO-RR.) At the time Transfer occurred, Debtors maintained identical assets,  
6 had no assets other than the Properties and a few hundred dollars each in cash, had no employees, had  
7 no secured creditors besides Noteholder, and had no unsecured creditors other than professionals who  
8 engineered the Transfer. (Exs. S-V.)

9 **C. Debtors File for Bankruptcy on the Eve of Foreclosure**

10 On October 20, 2016, Olympia filed a Chapter 11 petition in the Eastern District of New York  
11 (the “NY Court”). (Ex. W.) On November 28, 2016 the other Transferees filed Chapter 11 cases in the  
12 NY Court (together with the Olympia Bankruptcy, the “NY Bankruptcies”). (Exs. X-Z.) Transferees  
13 and their principals did not contribute any funds to operate the Properties, either in connection with the  
14 NY Bankruptcies or otherwise.

15 In connection with a December 12, 2016 motion filed by Debtors in the NY Bankruptcies to  
16 obtain \$420,000 in post-petition financing for life safety repairs and other critical expenditures for the  
17 Properties, Debtors’ principal Michael Pilevsky agreed to personally guaranty repayment of amounts  
18 advanced by a third-party lender and provide cash deposits to secure such guaranty. (Ex. BB at 201:8-  
19 24.) Yet when Noteholder offered slightly better financing terms to Debtors for a debtor-in-possession  
20 loan, Mr. Pilevsky refused to provide the very same guaranty to Noteholder. (*Id.* at 203:5-15.) That  
21 conduct coupled with the refusal of Debtors to invest anything in the Properties above the \$100,000  
22 purchase price, are additional evidence of the tainted nature of the Transfer. The NY Court identified  
23 these facts, among others, as indicia of bad faith by the Debtors. In light of Debtors’ scheme to frustrate  
24 Noteholder’s legitimate enforcement efforts, on January 27, 2017, Noteholder filed a motion to dismiss  
25 the NY Bankruptcies.

26 **D. Debtors’ NY Bankruptcies Are Dismissed**

27 The NY Court issued an Order dismissing the NY Bankruptcies on October 19, 2017 (the  
28 “Dismissal Order”). (Ex. CC.) The NY Court issued the Dismissal Order following a detailed oral  
29 ruling on September 28, 2017 (the “Dismissal Ruling”). (Ex. DD.) In the Dismissal Ruling, the NY

1 Court rejected Debtors' argument that Noteholder's recovery was limited to approximately \$30 million,  
2 by finding that the Loans were in default, interest continued to accrue at approximately \$11,200 per day,  
3 and, even if the Court determined every one of Debtors' arguments were correct, Noteholder was owed  
4 at least \$37.2 million plus reasonable attorney's fees and other charges as of the Dismissal Ruling. (*Id.*  
5 at 38:24-39:17.) Those fees and the interest that will have accrued between the Dismissal Ruling and  
6 the foreclosure sales brings this amount to an undisputable \$39.2 million. While the NY Court set a  
7 floor for the amounts owed to Noteholder, it did not set a cap for those amounts which it acknowledged  
8 could be in excess of \$44.6 million as of May 1, 2017. (*Id.* at 43:1-10, Exs. EE and FF.) The amount  
9 owed on the Loans was properly fixed by Noteholder at \$46,613,166.93 as of October 17, 2017 – the  
10 date the Loans matured pursuant to their terms. (Exs. GG-NN.)

11 In the Dismissal Ruling, the NY Court further determined that the Properties were worth not  
12 more than \$39 million (Ex. DD at 42:16-22, 43:11-17), far less than the nearly \$42 million valuation  
13 Debtors claim. In fact, the NY Court repeatedly acknowledged in the Dismissal Ruling that there would  
14 be no assets available for unsecured creditors in the NY Bankruptcies, acknowledging that there is no  
15 equity in the Properties. (*Id.* at 24:2-6, 43:11-44:7.) Further, while the NY Court stopped short of  
16 dismissing the NY Bankruptcies on bad faith grounds, the Court did determine that Noteholder had  
17 presented several "indicia of bad faith" by Debtors, including (i) Debtors' acquisition of the Properties  
18 in fractional interests on the eve of the first scheduled foreclosure sales, (ii) Debtors' incorporation in  
19 four different jurisdictions, (iii) Debtors' refusal to contribute any capital whatsoever to the Properties  
20 or the NY Bankruptcies after acquiring the Properties, (iv) Debtors' manufacture of a class of unsecured  
21 creditors to create a consenting class for Debtors' proposed (and unconfirmable, as determined by the  
22 NY Court) plan, which raised a concern with the NY Court that Debtors did not propose their plan in  
23 good faith (and the Debtors continue to manufacture unsecured claims by "stiffing" their New York  
24 bankruptcy counsel), (v) Debtors' insiders' failure to adequately capitalize Debtors or provide the same  
25 personal guaranty Michael Pilevsky offered to a proposed third party post-petition lender, and  
26 (vi) Debtors' motion to substantively consolidate the NY Bankruptcies, which served as additional  
27 evidence that Debtors' purported explanation for acquiring the Properties in fractional interests for tax  
28 purposes was a sham and Debtors' intent may have been to file serial bankruptcy cases. (*Id.* at 18:5-  
29 10; 20:20-21:5; 24:19-26:1; 26:13-19.)

1 **E. Debtors Act in Bad Faith After the NY Bankruptcies Are Dismissed**

2 After the NY Bankruptcies were dismissed, the non-judicial foreclosure sales of the Properties  
3 were rescheduled for December 15, 2017. Debtors yet again sought to delay the inevitable sale of the  
4 Properties by filing a motion to enjoin the foreclosures in King County Superior Court, reviving  
5 arguments that were squarely rejected by the NY Court. Noteholder removed the action and the  
6 preliminary injunction to this Court in the CDC Bankruptcy. At a hearing before this Court in the CDC  
7 Bankruptcy on December 14, 2017, at which this Court raised the issue of its jurisdiction to decide the  
8 preliminary injunction motion, Debtors argued that the Court should remand the action because this  
9 Court did not have jurisdiction. However, unbeknownst to Noteholder or this Court, Debtors had signed  
10 the bankruptcy petitions filed in these cases on December 13, 2017, the day prior to the December 14,  
11 2017 hearing before this Court, and Debtors' counsel failed to disclose that Debtors were contemplating  
12 filing bankruptcy again and had already signed the petitions.

13 This Court remanded the preliminary injunction motion and action to state court and, under  
14 Bankruptcy Code Section 105, stayed Noteholder from proceeding with the foreclosure sales through  
15 the to-be-rescheduled hearing on the injunction motion, which was reset for a December 27, 2017.  
16 Noteholder continued the foreclosures to December 29, 2017. After Noteholder filed its opposition to  
17 the injunction motion on December 22, 2017, on the morning of the very next business day, December  
18 26, 2017, Debtors filed these bankruptcy cases, less than 24 hours before the scheduled hearing. As  
19 evidenced by entries on the dockets, this Court has determined the Debtors to be "repeat filers".

20 **F. The Receiver's Competent Management of the Properties**

21 Throughout the chaos wrought by the Debtors' misconduct, the Receiver has competently and  
22 steadfastly managed the Properties for the benefit of the Debtors and their creditors pursuant to the  
23 Receiver Order. In fact, Debtors twice entered into stipulations (the "Receiver Stipulations") with  
24 Noteholder and the Receiver that permitted the Receiver to remain in place under the terms detailed in  
25 the Receiver Order during the entire pendency of the NY Bankruptcies. (See Appendix 58-69, and  
26 Switzer Declaration, Ex. D.) In the second of the Receiver Stipulations, the Receiver and Debtors agreed  
27 that the Receiver would limit its fees to the Property Manager Fee provided for in the Receiver Order,  
28 and Construction Management Fees and Leasing Commissions under specific and narrow  
29

1 circumstances.<sup>4</sup> (*Id.*) Since the Receiver's engagement nearly two years ago, the Receiver has  
2 successfully worked to stabilize the Properties by performing necessary life safety repairs, identifying  
3 replacement tenants for vacant Properties, extending existing tenant leases, and completing tenant  
4 improvements necessary to obtain and retain those tenants. (January 16, 2018 Declaration of Edward  
5 Velton (the "Velton Declaration") at ¶ 3 [Dkt. No. 30].) Throughout this work, the Receiver has been  
6 confronted with nervous tenants who have been concerned about the condition of the Properties, the  
7 improper transfers to the Debtors, the uncertainty concerning ownership of the Properties, and the  
8 Debtors' NY Bankruptcy filings. (*Id.* at ¶ 4.) Notwithstanding these issues, as a result of the Receiver's  
9 earnest stewardship of the Properties, the Receiver now maintains \$1,741,111.84 in cash as of January  
10 11, 2018, as opposed to the near nominal cash position that required the Debtors to seek \$420,000 in  
11 post-petition financing at the outset of the NY Bankruptcies. (*Id.* at ¶ 6.) As set forth below, these funds  
12 are necessary for critical tenant improvements and repairs to be conducted in connection with lease  
13 renewals for existing tenants and potential new tenants.

14 In addition to improving the cash position of the Properties, the Receiver has made significant  
15 progress in negotiating lease extensions with tenants in three of the Properties whose leases are expiring  
16 in the near term. As the Debtors admit in the Switzer Declaration in support of their motion (at ¶ 4),  
17 "several large leases are up for renewal which will significantly affect both the income and valuation  
18 of" the Properties. These leases include the properties at 4565 7th Avenue in Lacey ("7th Avenue"),  
19 805 South Mission Street in Wenatchee ("Mission Street"), and 640 and 645 Woodland Square Loop in  
20 Lacey (collectively, "Woodland Square"). (Velton Declaration, Ex. A.) In order to complete these lease  
21 extensions, the tenants have required certain near-term improvements that will cost substantially more  
22 than the cash currently held by the Receiver. These costs include: approximately \$2.4 million to re-  
23 stack the three tenants in 7th Avenue in order to secure 5 and 10 year lease extensions from each of  
24 those tenants; approximately \$1.3 million in improvements to Mission Street to secure a 10 year lease  
25 extension from the single tenant occupying that building; and approximately \$200,000 to complete work  
26 on vacant space in 640 Woodland Square that was infested with mold when the Receiver took possession  
27 of the Properties but will now be occupied by the tenant that is presently leasing space in that property.

28  
29 <sup>4</sup> Noteholder understands that the Receiver is willing to continue with its engagement pursuant to these terms, to which Debtors previously agreed.

1 (*Id.*) Thus, in addition to the \$1,741,111.84 the Receiver is currently holding, the Receiver may need  
2 substantial additional funds that very likely will not be procured entirely through the Properties' net  
3 operating income. As Debtors admit, the negotiation of these leases and renewals/extensions, which  
4 require approximately \$3.7 million in tenant improvements to close, is critical to the long term financial  
5 health of the Properties. As such, the Receiver's ongoing involvement in these negotiations, and its  
6 continued stewardship of these Properties, is critical to the preservation of the Properties' value for the  
7 benefit of all parties.

### 8 III. ARGUMENT

#### 9 A. The Court Should Not Terminate the Receiver's Engagement or Require Receiver to Turn 10 Over the Properties to the Debtors, and Should Authorize the Receiver to Remain in Place and Excuse Compliance with the Requirements of Section 543(a) and (b)

11 The Debtors' claim that the Receiver no longer has legal authority over the Properties after  
12 dismissal of the NY Bankruptcies is meritless. After the dismissal of the NY Bankruptcies, the Receiver  
13 remained and remains in place pursuant to with the Receiver Order, as the Receiver Stipulations kept  
14 the Receiver in place pursuant to the terms of the Receiver Order. As a result, the Receiver Order was  
15 never terminated. Even if the Receiver Order had been terminated or modified in connection with the  
16 NY Bankruptcies or otherwise, the dismissal of the NY Bankruptcies automatically reinstated the  
17 Receiver pursuant to the unmodified terms of the Receiver Order. *See* 11 U.S.C. § 349(b)(1)(A). As  
18 such, When Debtors filed their second set of Chapter 11 petitions on December 26, 2017, the Receiver  
19 became a "custodian" under the Bankruptcy Code. 11 U.S.C. § 101(11)(A) ("The term 'custodian'  
20 means — (A) receiver or trustee of any property of the debtor, appointed in a case or proceeding not  
21 under this title[.]"). Generally, a custodian-in-possession is required to deliver all debtor assets within  
22 his custody and control to the trustee or the debtor in possession, following commencement of the case.  
23 11 U.S.C. § 543(b)(1).

24 However, a bankruptcy court may excuse compliance with the turnover provisions of section  
25 543 if "the interest of creditors . . . would be better served by permitting a custodian to continue in  
26 possession, custody or control of such property[.]" 11 U.S.C. § 543(d)(1); *see also In re Si Yeon Park,*  
27 *Ltd.*, 198 B.R. 956, 963-64 (Bankr. C.D. Cal. 1996) ("It is up to the bankruptcy court to decide, in its  
28 discretion, whether the receiver should be excused from turning over assets of the bankruptcy estate,  
29 under standards of federal law set forth in § 543."). "The interests of the debtor, however, are not part

1 of the criteria considered when applying section 543(d)(1).” *Dill v. Dime Savings Bank, FSB (In re*  
2 *Dill)*, 163 B.R. 221, 225 (E.D.N.Y.1994) (citing 4 Collier on Bankruptcy, ¶ 543.05 at 543–12 (15th Ed.  
3 1993) (“section 543(d)(1) does not require an analysis of the interests of the debtor”).

4 A determination under Section 543(d) is fact-intensive, and courts consider a number of factors,  
5 including, (a) whether the debtor will use the property in question for the benefit of the creditors,  
6 (b) whether there has been mismanagement by the debtor, and (c) whether there will be sufficient  
7 income to fund a successful reorganization. *In re Orchards Village Invs., LLC*, 405 B.R. 341, 352  
8 (Bankr. D. Ore. 2009). Section 543(d) is “intended to provide flexibility when there is no useful purpose  
9 to be served by turnover.” *In re Plantation Inn Partners*, 142 B.R. 561, 564 (Bankr. S.D. Ga. 1992).  
10 Essentially, the analysis “turn[s] upon whether the assets of the particular debtor should be administered  
11 by the existing custodian or returned to the debtor.” See *In re Uno Broadcasting Corp.*, 167 B.R. 189,  
12 200 (Bankr. D. Ariz. 1994).

13 Noteholder understands that the Receiver is prepared to remain as the Receiver subject to the  
14 entry of an order, which excuses it from compliance with section 543. In light of the Receiver’s conduct  
15 in connection with the NY Bankruptcies and its nearly two year management of the Properties, the  
16 Receiver will certainly be able to maintain and manage the Properties at a high standard for the benefit  
17 of all parties. As set forth above, the Receiver has developed a substantial working knowledge of the  
18 operations of the Properties and positive relationship with the tenants by managing the Properties and is  
19 integral to the ongoing negotiations regarding lease extensions for the Properties and the required tenant  
20 improvements associated therewith. For the following reasons, it is in the best interests of creditors and  
21 the estates for this Court to deny the Debtors’ Motion to terminate the Receiver, and enter an order  
22 preserving the status quo and excusing the Receiver from the turnover provisions of Section 543 of the  
23 Bankruptcy Code. Throughout the chaos and turmoil caused by Debtors’ shenanigans, the only constant  
24 has been the Receiver’s management of the Properties. It should be allowed to remain in place so as not  
25 to add to the confusion.

26 **1. The Receiver Is in the Best Position to Maintain the Value of the Properties for the**  
27 **Benefit of Creditors**

28 In *Uno Broadcasting*, the bankruptcy court for the District of Oregon concluded that the  
29 interests of creditors were best served by the receiver’s retention of estate property:

1 In this case, it is not difficult to conclude that the assets of the Debtor  
2 should remain in the hands of the Receiver. The evidence suggests that  
3 the Receiver has been proceeding expeditiously and professionally to  
4 manage the affairs of the Debtor. The Receiver has begun to deal with  
5 seriously delinquent obligations to the Internal Revenue Service, has  
6 reorganized management, has implemented accounting controls, has  
7 contacted and dealt with numerous vendors and has taken certain  
8 personnel actions. . . . [T]his Court is satisfied, as was the District Court,  
9 that the Receiver is proceeding appropriately and expeditiously in  
10 handling the affairs of the estate.

11 *Uno Broadcasting*, 167 B.R. 189 at 200.

12 Similar to the receiver in *Uno Broadcasting*, the Receiver in this case has been effectively  
13 managing the affairs and finances of the Property, and has been working diligently to maintain value  
14 and operate the Properties. Specifically, since its appointment on May 19, 2016 and throughout the  
15 pendency of the NY Bankruptcies and thereafter, the Receiver has been and is, among other things,  
16 significantly engaged in numerous in-process projects in connection with the Properties, including the  
17 rehabilitation and stabilization of the Properties, ongoing lease negotiations with existing and  
18 prospective new tenants, and the required tenant improvements associated therewith.

19 Requiring turnover would risk jeopardizing the value that the Receiver has worked diligently  
20 since its appointment in May 2016 to preserve and create, which would in turn harm all the stakeholders  
21 in this Chapter 11 case. *Orchards Village*, 405 B.R. at 353 (allowing the receiver to remain in place  
22 because he had substantially improved the operations of the receivership property during his tenure).

## 23 **2. Debtors Are Not Qualified to Manage the Properties**

24 On the other hand, the operation of the Properties by the Debtors or by Kidder Mathews,  
25 Debtors' proposed property management company, could be disastrous for Noteholder and other  
26 creditors of the Debtors. *Uno Broadcasting*, 167 B.R. at 201 (noting that there was a risk of "substantial  
27 disruption, duplication, costs, and confusion" if receiver was terminated). Due to the Receiver being  
28 appointed before Debtors allegedly acquired the Properties from CDC and the Debtors never having  
29 managed the Properties, the Debtors lack any experience in operating or maintaining the Properties.  
Terminating the Receiver and inserting a new property management company in its place with no  
experience with the Properties could result in a sharp reduction in lease revenue and lack of maintenance

1 on the Properties, as was the case when the Receiver took possession of the Properties nearly two years  
2 ago.

3 The purported cost savings by employing Kidder Mathews rather than the Receiver would be  
4 miniscule compared to the loss of value to the estate, particularly in light of the fact that Debtors have  
5 not provided any evidence of a firm commitment by Kidder Mathews to provide property management  
6 services at the rates outlined in the Debtors' Motion, and the Receiver's willingness to continue to  
7 provide services for the reduced fee amounts outlined in the Receiver Stipulations, to which Debtors  
8 agreed thereunder. Additionally, the Debtors have indicated that Kidder Matthews is preparing updated  
9 appraisals for use in connection with these proceedings. (*See* Dkt. No. 60, Ex. I.) Kidder Matthews  
10 cannot be allowed to serve as the Debtors' property manager while also engaged as a potential expert  
11 witness. Further, termination of the Receiver would result in a lack of oversight and control by a  
12 fiduciary, especially if Debtors took over operation of the Properties and control of the cash flow. This  
13 is particularly relevant given the long-history of misconduct by the Debtors, which is set forth in detail  
14 above and in the Motion for RFS/to Dismiss, and includes the Debtors' purchase of the Properties in  
15 fractional interests as tenants in common each organized in different states for \$100,000, filing of the  
16 prior bankruptcy on the eve of foreclosure, refusal to fund necessary health and safety repairs, and  
17 continued misconduct in connection with these bankruptcy cases. The Debtors failure to invest a single  
18 dollar in the Properties beyond their initial \$100,000 purchase price, demonstrates that Debtors are not  
19 fit or qualified to oversee management of the Properties and their operations – and seek turnover by the  
20 Receiver primarily to grab the cash on hand which is all necessary for critical work to be done on the  
21 Properties in connection with leasing activity.

22 Given the Receiver's proven success in managing and operating the Properties, it is most  
23 prudent, and in the best interest of the creditors, for the Receiver to continue in possession and control  
24 of the Properties. Indeed, Debtors surely recognized the value of the Receiver when they twice entered  
25 into the Receiver Stipulations retaining the Receiver during the entire year-long pendency of the NY  
26 Bankruptcies. In light of the Debtors' continuing misconduct with respect to the Properties, and the  
27 Receiver's successful operation of the Properties for a sustained period of time, requiring the Receiver  
28 to turn over the Properties to Debtors would subject creditors to the unnecessary risk that the Properties'  
29 will revert to their derelict status before the Receiver's appointment.

1                   **3. Debtors Have Not Cured Their Defaults and Cannot Reorganize**

2           Regarding the availability of income to fund a successful reorganization, the court in *Orchards*  
3 *Village* considered how prepetition funds were used in light of mortgage, insurance, tax and other  
4 obligations. *Orchard Village*, 405 B.R. at 353. Further, in denying turnover and deciding to retain the  
5 receiver, the court in *Orchard Village* noted specifically that none of the loan defaults had been cured.  
6 *Id.* Here, the appointment of the Receiver in May 2016 was triggered by CDC's default on the Loans  
7 and the impending foreclosure sale of the Properties. As set forth above and in the Motion for RFS/to  
8 Dismiss, the Debtors have yet to cure the defaults under the Loans which the NY Court found in the  
9 Dismissal Ruling had occurred at least as of the filing of the NY Bankruptcies. In fact, the Loans have  
10 now matured in accordance with their terms, and the only way to cure the defaults under the Loans is  
11 for the Debtors to pay them in full.

12           Moreover, the Debtors have indicated that they do not intend to reorganize, but rather plan to  
13 liquidate the Properties—the Debtors' only purported asset. As no reorganization is contemplated, the  
14 Properties and any income from them should not be turned over to the Debtors, particularly in light of  
15 the Receiver's ongoing competent management of the cash generated by the Properties, which is  
16 necessary for the impending tenant improvement expenses required to stabilize the Properties. As set  
17 forth above, maintaining the status quo of the Receiver and its long expertise and experience with the  
18 operations of the Properties is in the best interests of creditors.

19                   **B. The Funds Maintained by the Receiver are Earmarked for Necessary Tenant**  
20                   **Improvements and Repairs**

21           While Noteholder would certainly like to use the funds maintained by the Receiver to pay down  
22 the over \$46 million outstanding debt owed to Noteholder pursuant to the Loans, as set forth above,  
23 these funds are earmarked for tenant improvements and repairs that are necessary for the ongoing  
24 financial health and physical safety of the Properties. In light of these significant anticipated expenses,  
25 the Receiver should be permitted to retain the funds maintained in its accounts for the benefit of the  
26 Properties, and turnover should not be ordered.

1 **IV. CONCLUSION**

2 WHEREFORE, Noteholder respectfully requests that the Court deny the Debtors' Motion and  
3 enter an Order in the form attached hereto as Exhibit A.

4 .DATED this 17th day of January, 2018.

5 LANE POWELL PC

6 By /s/ Charles R. Ekberg

7 Charles R. Ekberg, WSBA No. 00342

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I affirm under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge.

/s/ Shadi Mahmoudi  
Shadi Mahmoudi, Esq.

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